

SERVED: June 11, 1992

NTSB Order No. EA-3583

**UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 26th day of May, 1992

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BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

v.

Docket SE-9472

JAMES E. HAMILTON,

Respondent.

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ORDER DENYING RECONSIDERATION

Respondent has filed a petition seeking rehearing, reconsideration, or modification of NTSB Order EA-3496, served February 26, 1992.<sup>1</sup> In that order, we affirmed the law judge's determination that respondent had violated 14 C. F. R. 91. 105(d) (1) in landing an aircraft at an airport under IFR<sup>2</sup> conditions, when access was controlled and ground visibility less than 3 statute miles. Respondent's appeal was dismissed as untimely. We granted the Administrator's appeal and modified the initial decision to reinstate a violation of 14 C.F.R. 91.9. A 15-day suspension was imposed.

Upon review of respondent's petition and the Administrator's reply in opposition, and for the reasons set forth below, we conclude that the petition neither establishes error in our original decision nor otherwise presents any valid basis for reconsidering either the findings or the sanction imposed. There

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<sup>1</sup>The petition offers no discussion to support the titled request for rehearing, and we will not consider it further.

<sup>2</sup>I.e. Instrument Flight Rules.

are, however, a number of matters that warrant comment.

First, noting that respondent's appeal from the law judge's decision was rejected as untimely, and therefore not considered, the Administrator argues that respondent may not now contest aspects of the Board's decision that he did not raise in his earlier appeal of the law judge's decision. In fact, the bar goes considerably farther. In Administrator v. Lambert, 4 NTSB 1373 (1984), respondent failed to file a brief in opposition to the initial decision and, as a result, his appeal was dismissed. In his petition for reconsideration, respondent advanced arguments on the merits, rather than challenging the Board's dismissal of his appeal. We held that he could not use a petition for reconsideration to raise challenges that should have been, but were not, made on appeal.

Although in that case arguments were not regarded as having been raised because respondent failed to perfect his appeal by filing a brief, the same result applies here, where the appeal was not perfected because the brief was late. Any challenge from respondent is therefore limited to the propriety of our decision to reject his earlier appeal.<sup>3</sup>

Second, in his petition, filed March 23, 1992, respondent indicated the existence of new evidence regarding operation of the airport's rotating beacon, and stated that an affidavit had been prepared and would be submitted as soon as the signature was obtained. Follow-up calls from the Board failed to produce the affidavit. Finally, almost 1 month later, on April 20th, respondent modified his petition, noting that the promised new evidence was based on a misunderstanding. He proceeded to provide alternative discussion on the subject.

Respondent neither sought nor obtained an extension of time to file either the affidavit or the substitute discussion. We strongly caution counsel for respondent that the Board adheres

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<sup>3</sup>Respondent appears to seek reconsideration of this holding in ¶ 5 of the petition, yet the discussion fails to present adequate facts on which to find that the delay in filing should be excused for good cause (the applicable standard). An attorney representing an airman before the Board is responsible for the proper performance of all matters related to the preservation of his client's rights, whether they are performed personally or delegated to others subject to his oversight. Administrator v. Matthews, 5 NTSB 1526, 1527 (1986).

strictly to its rules of procedure.<sup>4</sup> Were we to review the petition on the merits, we agree with the Administrator that the substitute ¶ 3 filed April 20th would not be considered.<sup>5</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's filing dated April 20, 1992 is rejected.
2. Respondent's petition is denied.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

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<sup>4</sup>See Administrator v. Hooper, NTSB Order EA-2781 (1988). We note also respondent's unsupported and unwarranted comment (Petition at 4) that, although the Board dismissed his appeal, it nevertheless read and considered it.

<sup>5</sup>And even if we considered the merits, respondent offers nothing to convince us that our prior decision should be reconsidered. Contrary to his suggestion, we did not rely on the lack of a working radio in finding a violation of § 91.9. Moreover, potential endangerment was established. See NTSB Order EA-3496 at 4 and fn. 6. Respondent's other comments regarding the import of the rotating beacon simply reflect a view that was not accepted by us or by the law judge. They do not undermine our findings, which are supported by the record as made.